

MEDICOLEGAL GRAND ROUNDS - LIABILITY FOR MENTAL ANGUISH BASED ON THE NEGLIGENT DISPOSITION OF REMAINS

by FRANK T. FLANNERY, M.D., J.D., COL, MC, USA

Health care providers may risk liability for actions taken subsequent to a patient's death. The common law has long recognized that the surviving spouse or the next of kin has a right to arrange for the disposition of remains and is generally entitled to immediate possession and custody of the body prior to burial.¹ Any interference with these rights places the health care provider at risk.

Errors that can incur liability include not only mutilation of a corpse but also unnecessary delay in delivery of the body.² Such acts can be either intentional or negligent, but they are legally actionable if they unduly compromise the relatives' right to burial, causing the relatives harm.

In these cases, the alleged harm is usually an infliction of mental anguish on the decedent's family. Certain jurisdictions require that mental anguish be accompanied by a contemporaneous physical injury.³ Others apply a more lenient standard, and allow compensation without physical injury, as long as the negligent disposition of remains proximately caused the mental suffering.⁴ Some jurisdictions with the lenient standard, however, require that any mishandling of remains be wanton, willful, or malicious.⁵ Under this view, mental suffering is only occasioned by a defendant's reckless disregard for the survivors' right to arrange for proper burial.

An application of the lenient standard is found in a Texas case, *Saint Elizabeth Hospital v. Garrard*.⁶ There, a husband and wife had presented to the defendant hospital for delivery of their second child. At delivery, it was discovered that the patient was, in fact, carrying twins. A normal, healthy male infant was delivered, but his female twin was stillborn. The parents and the attending physician agreed that an autopsy should be performed. Instead, the infant's remains were mistakenly delivered to a mortuary and subsequently buried in an unmarked common grave.

The parents sued, alleging that both the hospital and the pathologist had negligently disposed of the infant's remains, causing them continued mental anguish. Specifically, the plaintiffs alleged that, because they would never know the underlying cause of the infant's death, they would suffer persistent worry about future pregnancies. Furthermore, traditional remembrances, such as visiting the grave, could never be performed. Finally, the negligent disposition of their child's remains had deprived them of the opportunity to conduct a funeral and experience the normal grieving process. The pleadings contained no allegation that there had been physical manifestations of this mental anguish.

The defendants contended that the plaintiffs had failed to state a claim because they had not alleged that any physical injury had accompanied the mental anguish. The trial court agreed and dismissed the action. This dismissal was reversed by a court of appeals, which interpreted Texas law as authorizing the recovery for mental anguish without proof of physical injury.

An appeal was then made to the Texas Supreme Court, where the evolution of the law regarding this subject was reviewed. The court noted the traditional reluctance to compensate for shock

unaccompanied by physical injury because of the difficulty in assessing such damages. In Texas, as in other jurisdictions, jurists had previously denied recovery, unless it could be demonstrated that a plaintiff's mental suffering was accompanied by physical manifestations. Although this requirement theoretically enhanced the validity of mental injury claims, the court found that, in practice, the physical injury requirement encouraged extravagant pleading and distorted testimony. Plaintiffs were induced to exaggerate somatic complaints, such as nausea and insomnia, to evince a "bodily injury" and preserve their cause of action.

While the difficulty of assessing psychic damages was recognized, it was nonetheless observed that freedom from severe emotional distress is a legitimate interest which the law should protect. Accordingly, the physical injury requirement was determined to be an unwarranted restriction on the right to freedom from such harm. The court unambiguously stated that proof of physical injury, resulting from mental anguish, would no longer be required in Texas to sustain a common law action for negligent infliction of mental distress. Physical injury and emotional harm were declared to be no longer materially distinctive in such a case.

The court noted further that jurors were best suited to determine whether and to what extent a defendant's conduct caused compensable mental anguish. Despite the absence of allegations involving physical injury, the reversal by the court of appeals was upheld.

Compensation for the tort of negligent infliction of mental anguish, or emotional distress, has long engendered legal debate. Many commentators have condemned the physical injury requirement as an artificial device serving no useful purpose. This Texas case illustrates the modern trend which allows recovery for negligent disposition of remains in the absence of physical harm. It should also serve as a warning that health care providers can subject themselves to liability by negligently failing to follow the proper instructions of the next of kin regarding disposition of remains.

REFERENCES

1. 22A Am. Jur. 2d *Dead Bodies* § 3 (1988).
2. Annotation, *Negligent Embalming - Liability*, 48 A.L.R. 3d 263 (1973).
3. 22A Am. Jur. 2d *Dead Bodies* § 151 (1988).
4. *Estate of Finn v. New York*, 76 Misc. 2d 388, 350 N.Y.S. 2d 552 (1973).
5. *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984).
6. *St. Elizabeth Hospital v. Garrard*, 730 S.W. 2d 649 (Tex. 1987).